No. 83-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOUIS F. PEICK, *et al.*,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

MOTION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS *AMICUS CURIAE*

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MOTION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

The American Trucking Associations, Inc. ("ATA") respectfully requests leave of the Court to file a brief as *amicus curiae* in the above-captioned action.[1] A copy of the brief is bound with this motion. As grounds for its motion, ATA states as follows:

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[1] Pursuant to Court Rule 36.1, ATA sought the consent of the parties to the filing of the brief. The Pension Benefit Guaranty Corporation ("PBGC") consented to the filing, but the petitioners did not.

1. The case at bar is a declaratory judgment action concerning the constitutionality of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[2] The MPPAA requires an employer who ceases contributions to a union-sponsored, multiemployer pension plan for any reason—including discontinuance of operations—to pay a withdrawal penalty that can equal or exceed the assets of the company.

2. ATA is the national trade association of the trucking industry, representing more than 18,000 trucking firms regulated in interstate commerce. ATA's overriding purpose is to advance the interests of the trucking industry nationwide through litigation, participation in administrative proceedings, and other means.

3. The trucking industry has been particularly hard hit by the MPPAA, in large part because the Motor Carrier Act of 1980[3] substantially deregulated the trucking industry and caused a dramatic increase in nonunion competition. Unionized trucking companies are forced to respond to this new competition in ways that trigger withdrawal liability, *e.g.*, by going out of business or moving locations.

4. Because of the dramatic impact of the MPPAA on the trucking industry, ATA has sought to aid member firms in legislative and litigation efforts to overturn the Act. In addition, ATA joined with four individual trucking firms who have suffered specific harm from the MPPAA in a suit challenging the constitutionality of the MPPAA as applied to them individually and as applied

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[2] P.L. No. 96-364, § 104, 94 Stat. 1208 (September 26, 1980) (codified at 29 U.S.C. §§ 1381-1405 (Supp. IV 1980)). The MPPAA amended the Employee Retirement Income Security Act of 1979 ("ERISA"), P.L. No. 93-406, 98 Stat. 824 (September 2, 1974) (codified at 29 U.S.C. §§ 1001-1381 (1976).

[3] P.L. No. 96-296, 94 Stat. 793 (July 1, 1980).

to the trucking industry as a whole. *ATA, et al. v. PBGC, et al.*, C.A. J82-0061(R) (S.D. Miss. filed February 14, 1982). The court currently has under advisement the plaintiffs' motion for summary judgment, which was argued on August 5, 1983.

5. As the representative of the trucking industry and as a litigant challenging the enforcement of the Act, ATA has a strong interest in ensuring that any appellate decision on the MPPAA carefully assess the withdrawal liability provisions in terms of their actual impact on employers.[4]

6. As more fully appears in the attached brief, the *Peick* case does not permit a proper assessment of the actual operation of the MPPAA. The case lacks a concrete factual record, as both the district court and the court of appeals noted.[5]

7. ATA believes the Court should consider the propriety of the *Peick* case as a vehicle for deciding the constitutionality of the MPPAA. The Court has in the past insisted on an "adequate and full-bodied record" when asked to review a declaratory judgment on "matters of serious public concern." *Public Affairs Associates, Inc. v. Rickover*, 360 U.S. 111, 112-13 (1962). So here, the lack of a factual record presents a serious obstacle to a proper adjudication of the constitutionality of the Act.

8. ATA has not submitted an *amicus* brief in *PBGC v. R.A. Gray & Co.*, No. 83-507 (prob. juris. noted October 10, 1983), because that case is limited to the retroactive application of withdrawal liability to employers who withdrew prior to the enactment of the Act. Although also raising the retroactivity issue, *Peick* presents the broader question of the Act's retrospective ap-

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[4] ATA filed *amicus* briefs in both lower courts raising arguments similar to those urged to this Court.

[5] *See* App. A 23a n. 16; App. C 19c.

plication to employers who signed collective bargaining agreements prior to enactment.

WHEREFORE, ATA respectfully requests leave of the Court to file its brief as *amicus curiae.*

Respectfully submitted,

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Dated: March 1, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS *AMICUS CURIAE*, CONCERNING PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The interest of the American Trucking Associations, Inc. as *amicus curiae* is set forth in the motion for leave to file that accompanies this brief.

SUMMARY OF ARGUMENT

The case at bar has a "minimal or nonexistent record with respect to the actual operation of the MPPAA," as the majority opinion below noted. (App. A 23a n.16).

This Court has admonished that declaratory judgments in "matters of serious public concern" should issue only on "an adequate and full-bodied record." *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112-13 (1962). Because *Peick* provides an insufficient record on which to adjudicate the constitutionality of the MPPAA, ATA respectfully suggests that the Court follow the procedure employed in *Rickover*—grant the writ of certiorari and vacate the judgment below with instructions to remand to the district court for the development of an adequate factual record.

ARGUMENT

The "Minimal or Nonexistent Record" of the *Peick* Case Precludes a Proper Evaluation of the Act's Constitutionality, and the Case Therefore Should Be Remanded for the Development of an Appropriate Record.

The MPPAA requires an employer who ceases contributions to a union-sponsored, multiemployer pension plan for any reason—including discontinuance of operations—to pay "withdrawal liability." The MPPAA applies this withdrawal penalty retrospectively, without a grace period, to employers who have been contributing under collective bargaining contracts made before its enactment, in which they agreed to contribute only on behalf of their own workers, only for hours worked, and only at the rates negotiated with the union at the collective bargaining table. The withdrawal penalty is imposed even though the withdrawing company has completely fulfilled these contractual obligations and has no control over or responsibility for the pension plan's actions leading to the unfunded liability that the withdrawing employer is forced to pay. There is no generally applicable limit on the size of the withdrawal liability, and the penalty can equal or exceed the assets of the employer. Because the MPPAA imposes potentially unlimited liability for a problem the employer neither created nor agreed to be responsible for, the MPPAA constitutes one of the most onerous and far-

reaching instances of retrospective impairment of contractual rights and obligations ever to reach this Court.

Peick is a declaratory judgment action brought by the trustees of a pension fund,[1] a union[2] and four employer associations,[3] challenging the constitutionality of the Act primarily on Contract Clause grounds. No individual employer was a plaintiff in the suit, no individual harm resulting from the application of the statute was challenged, and no facts regarding the impact on individual companies were presented beyond the date of withdrawal and amount of potential liability.[4] The plaintiff Local 705 Fund has not sought to collect withdrawal liability. (App. C 14c-15c). The defendant in the case is the Pension Benefit Guaranty Corporation ("PBGC"), the government agency with the responsibility for administering and enforcing the MPPAA. (*Id.* 16c).

The district court noted "the lack of a factual record" in *Peick*. (App. C 19c). The court of appeals majority also noted "the minimal or nonexistent record with respect to the actual operation of the MPPAA." (App. A 23a n.16).

The "minimal or nonexistent record" in *Peick* contrasts sharply with other cases around the country in which the constitutionality of the withdrawal liability

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[1] Local 705 International Brotherhood of Teamsters Pension Fund ("Local 705 Fund").

[2] Truck Drivers, Oil Drivers, Filling Station & Platform Workers Local 705, International Brotherhood of Teamsters.

[3] Illinois Motor Truck Operators Association ("IMTOA"), Illinois Trucking Associations, Inc. ("ITA"), Cartage Exchange of Chicago ("CEC"), and Motor Carriers Labor Advisory Council ("MCLAC").

[4] The only factual information before the district court on employer withdrawals was the affidavit of an actuary, A. S. Hansen, which listed the dates on which certain companies withdrew and the amount of their liability if the Local 705 Fund sought to collect the liability. Hansen Affidavit p. 34, Exhibit 2 to the Complaint herein.

provisions of the MPPAA is challenged. According to the list prepared by the PBGC and included as Appendix D to the Petition, at least 115 other cases challenging withdrawal liability have been filed. In each of these cases, either a pension plan is seeking to collect withdrawal liability with the employer defending on grounds of the Act's unconstitutionality or, more typically, the employer is seeking declaratory and injunctive relief because of specific harm caused by the statute. Unlike the abstract challenge presented in the *Peick* case, such cases require the development of a record showing the actual operation and impact of the statute—a record necessary for an adequate evaluation of the Act's constitutionality.

The suit in which ATA is involved presents challenges to specific applications of the MPPAA's withdrawal liability provisions. In addition to ATA, there are four individual trucking firms named as plaintiffs. As alleged in the complaint, plaintiff Dean Truck Line, Inc. went out of business in 1981 and was assessed over $678,000 in withdrawal liability by the Central States Fund, which is a defendant in the lawsuit.[5] Plaintiffs T.I.M.E.-DC, Inc. ("TIME-DC") and East Texas Motor Freight Line, Inc. ("ETMF") negotiated for the sale of TIME-DC's assets to ETMF. Every detail of the transaction was consummated but one—the allocation of TIME-DC's estimated withdrawal liability of $29 million—and that last detail stopped the transaction.[6] Plaintiff Miller Transporters, Inc. was forced by the Act to post bonds totalling over $800,000 to purchase another company, and the possibility of some business decisions involving a cutback of the former company's operations and leading to liability on those bonds severely restricts Miller's freedom of operation.[7]

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[5] Complaint ¶¶ 42-43, ATA v. PBGC, C.A. No. J82-0061(R) (S.D. Miss. filed February 14, 1982).

[6] *Id.* ¶¶ 34-37.

[7] *Id.* ¶¶ 38-41.

Moreover, as the representative of the trucking industry, ATA has presented other testimony detailing the harms caused by the Act. In support of their Motion for Summary Judgment filed August 4, 1982, the plaintiffs filed twelve affidavits from trucking employers who have been harmed by the Act.[8] In addition, the plaintiffs have filed affidavits, documents, and information showing the effect of the MPPAA on the trucking industry as a whole and explaining the relationship among the employers, unions, and pensions funds. Discovery occupied almost a year in the case, and all of the plaintiffs and their witnesses were subject to depositions.

The kind of record developed in the *ATA* case is necessary to illuminate fully the issues presented by the MPPAA. The *Peick* case lacks such a record, and the lack of a factual record distorted the majority's assessment of the Act in the court below. For example, the majority apparently assumed that withdrawal is a voluntary act on the employer's part. In assessing the rationality of the time for the imposition of withdrawal liability of the Act, the Court stated: "Only when that burden [of plan underfunding] becomes part of the *choice* of the proposed withdrawer, can that *choice* be made with appropriate concern for the economic expectations of the beneficiaries of the plan." (App. A 35a) (emphasis added).

The majority could not have made such an assumption with the facts of actual "withdrawals" before it. For example, Keith Fulton & Sons, Inc., a former trucking company in Boston, Massachusetts, had its property

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[8] In addition to the situations involving the four company plaintiffs, the affidavits present testimony of companies that have been assessed withdrawal liability for going out of business, moving locations, or the action of their employees in decertifying the union. Other trucking companies whose affidavits have been introduced in the case have been precluded from selling companies and moving locations because of the effect of the Act.

taken by right of eminent domain by the City of Cambridge, thus forcing it out of business. The pension plan demanded "withdrawal liability" in excess of $400,000. *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, C.A. No. 81-2378-S (D. Mass. August 3, 1983), *appeal pending*, No. 83-1804 (1st Cir., oral argument heard January 5, 1984).[9] There can be no serious discussion of Keith Fulton's "choice" in "withdrawing."

Similarly, Dean Truck Lines, one of the plaintiffs in the *ATA* suit, had little "choice" as to closing its doors because it had lost money in its previous four years of operation due to the impact of trucking deregulation.[10] Its only alternative was to continue in business until forced into bankruptcy. Nonetheless, because Dean had to cease pension contributions as a consequence of going out of business, Dean was assessed $678,000 in withdrawal liability.

Such facts demonstrate both the harshness of the Act and the point that "withdrawals" are not necessarily voluntary acts that can be swayed by the existence of withdrawal liability. Such facts demonstrate that withdrawal liability constitutes a confiscation of assets for events beyond the employer's control—assets which in Dean's case were necessary to pay off creditors and avoid the stigma of bankruptcy. Without the facts of actual withdrawals before it,[11] however, the *Peick* ma-

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[9] The district court opinion, which upheld the Act as applied to Keith Fulton with little analysis, is available through Lexis *sub nom. Republic Industries, Inc., et al. v. New England Teamsters and Trucking Pension Fund.* To ATA's knowledge, the opinion has not been otherwise reported.

[10] Affidavit of William W. Odom, Jr., filed in *ATA v. PBGC*, note 5 *supra*.

[11] The *Peick* majority stated that "there is no way for this particular case to reach a 'fitter' stage." (App. A 24a). At a minimum, facts concerning the circumstances surrounding the withdrawals of

jority was unable to evaluate these critical aspects of the impact of withdrawal liability.

The inadequate record also distorted the majority's assessment of the employer's lack of contractual or causal responsibility for pension plan underfunding:

> We see no disabling inequity in imposing withdrawal liability on employers when the pension plans they have joined voluntarily turn out to be underfunded. It is true that an individual employer may not have much influence on many important decisions which affect a plan's financial stability. *But, of course, this is the arrangement the employer entered into, and it is the employers' contributions that have been inadequate to keep the vested liabilities fully funded.*

(App. A 47a) (emphasis added). This statement assumes facts as to "the arrangement the employer entered into" and as to the source of underfunding to which withdrawal liability allegedly is directed. This statement obscures aspects of the relationship among employer, union, and pension fund critical to assessing the constitutionality of withdrawal liability—aspects that would be evident if there were a concrete record in the case.

Prior to the enactment of the MPPAA, the employer agreed to make contributions to the pension fund in arms-length bargaining with the union. Because the employer has no control over fund actions,[12] the employer could agree to make the contributions in the first instance only if the contributions represented a known and limited commitment. The fund has complete control over the

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members of the employer associations would have permitted a more informed analysis of the fundamental fairness of imposing withdrawal liability by identifying, *e.g.*, those circumstances where a substantial portion of an employer's assets are taken through withdrawal liability for an event beyond the employer's control.

[12] *See* NLRB v. Amax Coal Co., 453 U.S. 322, 336-38 (1981).

amount of benefits and the service requirement necessary for vesting—key elements in underfunding.[13] The essential infirmity of the MPPAA is in assigning an employer liability for a problem he did not agree to be responsible for and did not create.[14]

The majority's statement quoted above, however, implies that the employer bears some causal responsibility for the fund's problems by not voluntarily making higher contributions. In addition to misperceiving the role of collective bargaining, this conclusion ignores that the employer cannot require the fund to use the increased contributions to reduce underfunding rather than increase benefits.[15] The majority's statement also implies that the

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[13] These critical attributes are well-developed in the ATA case and other cases presenting concrete instances of the application of the MPPAA.

[14] Lack of causal or contractual responsibility for the problem addressed provides the key distinction between the MPPAA's imposition of withdrawal liability and the imposition of liability for black lung benefits considered in Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976). *See id.* at 19 (emphasis added):

> The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, *the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored*—to allocate to the mine operator an actual, measurable cost of his business.

Unlike the employer in *Turner-Elkhorn* who controlled the conditions that led to the problem being addressed, the employer who contributes to a multiemployer pension plan cannot control plan management—and hence underfunding—even through collective bargaining. Sinai Hospital v. National Benefit Fund, 697 F.2d 562 (4th Cir. 1982) (provision obtained in collective bargaining specifically limiting increase of benefits of multiemployer health and welfare plan held not to bar plan's increase of benefits where management of plan is vested in trustees through trust agreement); NLRB v. Teamsters Local 282, 670 F.2d 855 (9th Cir. 1982) (multiemployer plan may lawfully grant a benefit even though the individual employer has refused that benefit in collective bargaining and has refused to increase contributions to fund the benefit).

[15] *See* note 14 *supra*.

employer implicitly ratified the fund's problems by remaining a contributor—a fiction that could arise only from the absence of information in the record.

In sum, without a factual setting demonstrating the actual operation of the Act, the constitutionality of withdrawal liability cannot be fairly evaluated. The actual impact of the MPPAA and the constitutional significance of the MPPAA's abrogation of the contractual relations among employer, union, and pension fund can be adequately assessed only based on a concrete factual record.

The district court attempted to avoid the problem of an inadequate factual record by labelling the *Peick* case a "facial" challenge. *See* App. C 19c, 48c & n.63. Much scarce timber was expended in the court of appeals over the question of whether the case presented an "as applied" or a "facial challenge," with the majority eventually concluding that "[w]e do not need to pursue this question, however, since we do not think it has any bearing on our decision about the constitutionality of the MPPAA in the case before us." App. A 23a n.16.

ATA agrees with the majority's conclusion, but for a different reason: Nothing in the Declaratory Judgment Act requires a court to decide a case in a vacuum—bereft of facts—regardless of whether the challenge is a "facial" one.[16] The exercise of declaratory judgment juris-

[16] Moreover, the precedent on which the district court relied does not hold that facts are irrelevant even in terms of a "facial analysis." For example, the district court as well as the PBGC relied heavily on Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981), for the conclusion that facts are irrelevant in the instant case. In *Hodel*, however, there was a 13-day trial at the district court level on the operation of the statute and its effect on the plaintiffs, and the Court relied on the district court's findings of fact in rendering its decision. *See* 452 U.S. at 273, 293-97. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384-85 (1926) (facts regarding effect of challenged zoning statute on value of plaintiff's land and uses to which land could be put).

diction is a matter committed to the sound discretion of the court, *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961), and a court may decline relief even when the court otherwise has jurisdiction, *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Geni-Chlor International, Inc. v. Multisonics Development Corp.*, 580 F.2d 981 (9th Cir. 1978).

In the past, this Court has emphasized the need for an adequate factual record in declaratory judgment actions and has remanded to develop the necessary facts when they were lacking. In *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962) (per curiam), the Court on its own motion vacated and remanded a declaratory judgment action relating to intellectual property copyrights where the lower courts' rulings had been predicated on a "sketchy" agreed statement of facts. The Court noted that "[t]he Declaratory Judgment Act was an authorization, not a command." The Court expressed its concerns about a judgment based on an inadequate record in terms directly applicable to the *Peick* case:

> In these cases we are asked to determine matters of serious public concern. . . . These are delicate problems; their solution is bound to have far-reaching import. *Adjudication of such problems, certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full-bodied record.* The record before us is woefully lacking in these requirements.

369 U.S. at 112-13 (emphasis added),[17]

The *Peick* petition similarly requests this Court to adjudicate the constitutionality of a far-reaching and onerous statute without the benefit of a concrete factual record. As evidenced by the majority opinion below, such an adjudication risks misinterpreting the operation and ef-

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[17] On remand, the district court developed the facts that had been previously lacking. Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967).

fect of the Act. The Court has "often declined to decide important questions regarding 'the scope and constitutionality of legislation . . .' in the absence of 'an adequate and full-bodied record.'" *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954), and *Rickover*, 369 U.S. at 113). Considerations of judicial economy advanced by the petitioners, *see* Petition at 24-25, cannot justify the risks inherent in deciding these issues on the basis of an inadequate record. The Court consequently should consider following the procedure employed in *Rickover*—grant the writ of certiorari and vacate the judgment below with instructions to remand for the development of an adequate factual record.

CONCLUSION

The majority opinion in the court below acknowledged that the *Peick* case has a "minimal or nonexistent record." A "minimal or nonexistent record" is an insufficient basis on which to adjudicate issues as important as those presented by the MPPAA. ATA therefore respectfully suggests that the Court grant the writ of certiorari and vacate the judgment below with instructions to remand to the district court for the development of an adequate factual record.

Respectfully submitted,

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